SJC-13145

IN THE MATTER OF MICHAEL J. KELLEY.

Suffolk. January 7, 2022. - March 16, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Attorney at Law, Disciplinary proceeding, Attorney-client relationship, Use of confidence or secret, Public reprimand. Evidence, Presumptions and burden of proof. Words, "Generally known."

Information filed in the Supreme Judicial Court for the county of Suffolk on September 15, 2020.

The case was reported by Lowy, J.

Pamela A. Harbeson, Assistant Bar Counsel.
Joseph S. Berman for Board of Bar Overseers.

LOWY, J. The Board of Bar Overseers (board) voted to publicly reprimand the respondent, Michael J. Kelley, for failing to communicate adequately with a client and for failing to deliver various clients' files to successor counsel in a timely fashion. However, the board concluded that bar counsel

had failed to prove an additional charge, namely, that the respondent had disclosed confidential information about a client in violation of Mass. R. Prof. C. 1.6 (a), as amended, 474 Mass. 1301 (2016) (rule 1.6 [a]), and Mass. R. Prof. C. 1.9 (c), as appearing in 471 Mass. 1359 (2015) (rule 1.9 [c]). Bar counsel demanded that an information be filed with the county court.

The primary issue before us is the role of the "generally known" analysis in deciding whether an attorney has disclosed confidential information improperly. See rule 1.6 comment 3A (comment 3A) ("'Confidential information' does not ordinarily include . . . information that is generally known in the local community or in the trade, field or profession to which the information relates"). We conclude that the question whether information is "generally known" is, when important, part of bar counsel's burden of proof. Bar counsel here did not provide sufficient evidence that the respondent disclosed confidential information because bar counsel did not prove by a preponderance of the evidence that the information was not generally known. Considering the respondent's other professional misconduct, however, we agree with the board that the respondent should be publicly reprimanded.

Background. We summarize the facts relevant to the respondent's purported disclosure of confidential information that are supported by substantial evidence. See S.J.C. Rule

4:01, § 8 (6), as appearing in 453 Mass. 1310 (2009). We leave for later discussion the facts pertaining to the respondent's other alleged misconduct, which involved different clients.

An individual contacted the respondent seeking assistance in appealing from the Social Security Administration's denial of her brother's claim for disability benefits. The brother (client) signed a fee agreement with the respondent. The respondent filed an appeal on the client's behalf in Federal District Court, and a judge in that court subsequently issued an order stating that the client either had to pay a filing fee or move for leave to proceed without paying the fee. The respondent attempted to contact the client multiple times about signing the paperwork necessary for seeking leave to waive the filing fee, and he moved successfully to enlarge the time for filing the paperwork; the client, however, never responded. A Federal District Court judge dismissed the action without prejudice on May 19, 2014. The respondent notified the client of the dismissal.

Around two years later, the client's sister contacted the Federal District Court to check the appeal's status and learned that the appeal had been dismissed. After failing to find a different attorney to represent her brother, the client's sister, who was herself an attorney, filed a motion to vacate the dismissal. The motion asserted that the client's sister had

made several attempts to contact the respondent regarding the status of her brother's case but had received no response from him, and that she therefore did not learn about the dismissal until she contacted the court. The motion also stated that the respondent had said he would return the client's file to the client but had not done so.

The respondent filed a "response" to the motion to vacate on behalf of himself and not in support of any party. The affidavit attached to the response stated, among other things, that "[o]n February 12, 2016, [the client] was arrested by the . . . [p]olice for allegedly shoplifting and possession of Class A drugs," and "[o]n February 20, 2017, [the client] was arrested by the . . . [p]olice for allegedly assaulting and battering a person [sixty] or older or disabled." The affidavit suggested, and an earlier letter from the respondent to the client's sister had asserted, that the respondent believed that the client's sister had become interested in the client's claim for disability benefits only after the client had been arrested.

Bar counsel filed a petition for discipline against the respondent, alleging that the respondent impermissibly had disclosed confidential information by including the client's arrest history in the affidavit. In his initial answer to the board's petition for discipline, which he later amended on the board's request, the respondent explained that he had

"discovered the circumstances of [the client]'s [first] arrest by Googling his name . . . . The information was contained within the [p]olice [b]lotter of [the client's] home town newspaper . . . ." The respondent claimed that he had learned about the client's second arrest in the same manner.

An evidentiary hearing was held before a hearing committee of the board. The respondent did not provide sworn testimony at the hearing, at which he represented himself. In his opening statement, however, he argued that the information about the client's arrests came "from the [town's] local paper. It was nothing that [the client] had told me or his sister had told me." He made a similar statement in his closing argument. When the respondent asked the sister on cross-examination whether the arrests "were published in the local paper," the sister testified, "I didn't personally see them in the paper. I can't really answer . . . that."

After the hearing, the hearing committee issued a report concluding that the respondent had disclosed confidential information in violation of the rules of professional conduct. The hearing committee observed that although the respondent had suggested during his opening statement and while questioning the client's sister that he had learned about the information at issue from a local newspaper, there was no evidence proving as much. Accordingly, the hearing committee decided, citing

comment 3A, that there was no evidence that the information was "generally publicized or known within the local community, or that [it was] a matter of widespread publicity, so as to except the information from the definition of 'confidential information.'" The hearing committee ultimately recommended, based on the disclosure of confidential information and other misconduct against different clients (the latter of which is discussed infra) that the respondent be suspended for ninety days and be required to pass the multistate professional responsibility examination.

Neither the respondent nor bar counsel appealed from the hearing committee's decision to the board. However, after reviewing the matter, the board made a preliminary determination to reject the hearing committee's report and recommendation. It gave the parties the opportunity to brief three issues: "(1) Which party bears the burden of proof as to whether the information at issue . . . is 'confidential information' within Rules 1.6 and 1.9 and their comments; (2) Did the party who bears the burden of proof on that issue satisfy its burden; and (3) Assuming no violations are found as to [the count involving disclosure of confidential information], what would be the recommended disposition?" See Rules of the Board of Bar Overseers § 3.52 (2017). Bar counsel and the respondent filed memoranda addressing the board's questions.

The board then decided that bar counsel had not proved that the information the respondent had disclosed was confidential. In its memorandum, the board explained that the hearing committee had been wrong to require the respondent to prove that the information was "generally known in the local community." Rather, according to the board, "it was up to bar counsel, who bears the burden to prove each element of an offense, to prove that the information was not generally known and therefore confidential. . . . The burden never shifts." Nevertheless, the board voted to impose a public reprimand for the respondent's other misconduct.

Bar counsel demanded that an information be filed in the county court. See S.J.C. Rule 4:01, § 8 (6). After a hearing, a single justice of this court reserved and reported the case to the full court. We agree with the board that bar counsel did not satisfy the burden of proving that the respondent disclosed confidential information and that the respondent should be publicly reprimanded for his other misconduct.

Discussion. 1. Whether the respondent disclosed confidential information. a. Legal background. In the first count of the petition for discipline, bar counsel alleged that the respondent violated rules 1.6 (a) and 1.9 (c) when he included information about the client's arrest history in his Federal District Court affidavit. Pursuant to rule 1.6 (a),

"[a] lawyer shall not reveal confidential information relating to the representation of a client" absent exceptions not relevant here. And pursuant to rule 1.9 (c), "[a] lawyer who has formerly represented a client in a matter . . . shall not thereafter[, absent exceptions not relevant here]: (1) use confidential information relating to the representation to the disadvantage of the former client, or for the lawyer's advantage, or the advantage of a third person, . . . or (2) reveal confidential information relating to the representation . . . ."

Comment 3A to rule 1.6 explains that whether information is "confidential" turns, in part, on whether it is "generally known." According to that comment, "'[c]onfidential information' does not ordinarily include . . . information that is generally known in the local community or in the trade, field or profession to which the information relates." The comment then explains that whether information is "generally known" depends primarily on how widespread the information has become:

> "Information that is 'generally known in the local community or in the trade, field or profession to which the information relates' includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not 'generally known in the local community.' As another example, a client's disclosure of

> the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews."

As this comment makes clear, the rule is concerned with whether information is known, not whether it is knowable. That the information is available in a public record is not dispositive; rather, the focus is on how many people in the relevant community, trade, field, or profession actually have learned the information.

b. Burden of proof. The issue presented here is how the analysis of what is "generally known" relates to bar counsel's burden of proof in determining whether an attorney has disclosed confidential information improperly. Whether information is generally known is not always dispositive because, according to comment 3A, generally known information is not confidential "ordinarily." When it is important whether information is generally known, bar counsel must prove that the information is not generally known to satisfy his or her burden of proof.

"In all disciplinary proceedings [b]ar [c]ounsel shall have the burden of proof by a preponderance of the evidence . . . ." Rules of the Board of Bar Overseers § 3.28. Therefore, to prove a violation of rule 1.6 (a) or rule 1.9 (c), bar counsel must prove by a preponderance of the evidence that a respondent has revealed or misused information that is "confidential." Because

comment 3A states that whether information is confidential depends in part on whether it is generally known, whether the information is generally known is intertwined with what bar counsel has to prove. It is, therefore, part of bar counsel's burden of proof.

An argument that information is generally known is not an affirmative defense that the respondent must prove. See Rules of the Board of Bar Overseers § 3.28 ("The [r]espondent shall have the burden of proof by a preponderance of the evidence on affirmative defenses and matters in mitigation"). An affirmative defense "does not directly challenge any element of the offense." Commonwealth v. Grafton, 93 Mass. App. Ct. 717, 720 (2018), quoting Commonwealth v. Farley, 64 Mass. App. Ct. 854, 861 (2005). Instead, "it involves a matter of justification peculiarly within the knowledge of the [respondent] on which he [or she] can fairly be required to adduce supporting evidence" (quotations, citation, and alteration omitted). Commonwealth v. Humphries, 465 Mass. 762, 769 (2013). Any argument about whether information is generally known relates to whether an element of the offense -- confidentiality -- is satisfied, not whether there is an independent justification for the offense. And, by its terms, the existence of "generally known" information is not a matter "peculiarly within the knowledge of the [respondent]" (citation

omitted). Id. Cf. Matter of Murray, 455 Mass. 872, 873, 887 (2010) (respondent has burden of explaining what happened to unaccounted-for cash that belonged to client and was not deposited in client trust account because, among other reasons, "it is the attorney who will be in possession of, or otherwise have access to, the relevant information").

Our decision that bar counsel has the burden of proving that information is not generally known does not impose an undue burden on bar counsel. By the time a case is before a hearing committee of the board, bar counsel should have conducted a thorough enough investigation to know how the respondent had learned of the disclosed information. See Rules of the Board of Bar Overseers §§ 2.1 (bar counsel must conduct investigation before taking action against respondent), 4.4(a), 4.5(a) (board may subpoena respondent at bar counsel's request). If the respondent learned of the information from an arguably public source, then that fact will limit the scope of bar counsel's inquiry regarding whether the disclosed information is generally known. If the respondent learned of the information from a private source, such as a client, then bar counsel may have to conduct additional research.[1] The need for further

[1] There was no evidence here about how the respondent learned of the information that he disclosed. The respondent indicated in his opening statement and closing argument at the hearing, and in his initial answer to the board's petition for

investigation, however, is no reason to avoid implementing the rules of professional conduct as written, especially considering the high stakes for attorneys involved in disciplinary proceedings. See Commonwealth v. Munoz, 384 Mass. 503, 507 (1981) ("assuming that it may be difficult for the Commonwealth to prove noninsurance, this obstacle does not warrant [shifting the burden to the defendant], in view of the fact that noninsurance is an element, in fact, the central element of [the] prosecution['s case]").

c. Application to the present case. We see no reason why this case should not fall within the "ordinar[y]" situation discussed in comment 3A, where the information disclosed, if generally known, would not be confidential. To prove that the disclosed information was confidential, therefore, bar counsel had to prove that it was not generally known. Because there was no evidence at the hearing that the disclosed information was

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discipline, that he had discovered the information in a local newspaper after searching for the client's name on the Internet. Opening statements and closing arguments are not evidence, however. See Commonwealth v. Alemany, 488 Mass. 499, 511 (2021). And after the chair at the hearing asked the respondent whether he wanted his opening statement to be treated as his testimony on the record, the respondent answered in the negative. We do observe, though, that information in a local newspaper of record might well be the sort of information that we would consider to be generally known, especially when the information is printed within a short time of the disclosure.

not generally known, bar counsel did not satisfy this burden of proof.

2. Sanction. The board sanctioned the respondent with a public reprimand for misconduct other than his alleged disclosure of confidential information. This misconduct involved multiple clients other than the client already discussed. The respondent does not challenge before this court either the conclusion that he engaged in the other misconduct or the sanction imposed, and we agree with the board that the respondent should be publicly reprimanded.

The hearing committee decided, and the board accepted, that the respondent failed to communicate adequately with a client, see Mass. R. Prof. C. 1.4 (a), as appearing in 471 Mass. 1319 (2015), and failed to deliver client files timely to successor counsel, see Mass. R. Prof. C. 1.15A, 480 Mass. 1316 (2018), and Mass. R. Prof. C. 1.16 (d) and (e), as appearing in 471 Mass. 1396 (2015) (effective until September 1, 2018). The findings underlying these conclusions are supported by substantial evidence. The failure to communicate involved a client who hired the respondent to refile an application for disability benefits related to military service. The claim was denied; the respondent filed an appeal and informed the client that he had done so. The respondent then failed to communicate with the client over the next ten months; the client retained a new

lawyer who successfully prosecuted the claim. The failure to transfer client files involved multiple clients applying for benefits related to military service who fired the respondent and directed him to deliver their files to successor counsel. The respondent delayed turning over the files, and when he did deliver them, they were incomplete.[2]

In cases involving failure to communicate, attorneys have been privately reprimanded, rather than receiving a harsher sanction, even in the face of aggravating circumstances. See Admonition No. 17-29, 33 Mass. Att'y Discipline Rep. 596, 599, 600-601 (2017) (attorney received private admonition for failing to communicate with client where attorney committed multiple rules violations, had substantial experience in practice of law, and previously had been disciplined). Attorneys also have been privately reprimanded in cases involving failure to deliver client files. See Admonition No. 05-13, 21 Mass. Att'y Discipline Rep. 698, 699 (2005) (attorney received private admonition for failing to communicate with client and not

[2] The respondent argued at the hearing and before the board that he delayed transferring his former clients' files because successor counsel failed to provide him with an appropriate consent form allowing him to release medical information. Bar counsel argued, and the board concluded, that the Federal regulations on which the respondent relied were inapplicable. Neither bar counsel nor the board discusses on appeal this apparently complex issue of Federal law, and we therefore do not analyze it.

returning file where attorney committed multiple rules violations and had substantial experience in practice of law).

Here, however, the aggravating factors warrant more than a private admonition. In addition to having substantial experience in the practice of law, see Matter of Moran, 479 Mass. 1016, 1022 (2018), and having been disciplined before, see Matter of Saab, 406 Mass. 315, 327-328 (1989), the respondent committed multiple rules violations involving multiple clients, see Matter of Strauss, 479 Mass. 294, 302 (2018), who were vulnerable individuals seeking disability benefits, see Moran, supra at 1023, citing Matter of Lupo, 447 Mass. 345, 354 (2006). Considering these aggravating factors, we agree with the board that a public reprimand is appropriate.

Conclusion. An order shall enter in the county court publicly reprimanding the respondent. See Rules of the Board of Bar Overseers § 3.56(a) ("In the event that the court orders . . . a public reprimand, the order of the court shall constitute the . . . public reprimand").

So ordered.